



**Kivunge v Steel Structures Limited (Cause 74 of 2019)
[2024] KEELRC 1307 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 74 OF 2019**

L NDOLO, J

MAY 30, 2024

BETWEEN

PETER MUYU KIVUNGE CLAIMANT

AND

STEEL STRUCTURES LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim as contained in his Memorandum of Claim dated 5th February 2019, is for compensation for unlawful termination of employment and payment of terminal dues. The Respondent filed a Response dated 11th June 2019.
2. The matter proceeded to hearing where the Claimant testified on his own behalf and the Respondent called its Divisional Director-Human Resource and Administration, Francis K. Njenga. The parties also filed written submissions.

The Claimant's Case

3. By a letter of appointment dated 4th July 2011, the Claimant was employed by the Respondent as a Driver. He worked as such until 24th August 2018, when his employment was terminated, on allegations of route deviation and an unauthorised stop. According to the Claimant, at the time of separation, he earned a monthly salary of Kshs. 82,133.77.
4. The Claimant states that he was not availed an opportunity for a fair hearing so as to explain himself on the allegations. He claims that his response was not taken into account and adds that he was not paid his terminal dues.
5. The Claimant's case is that the termination of his employment was unlawful and unfair. He therefore seeks the following remedies:



- a. A declaration that the termination of his employment was unlawful and unfair;
- b. Payment of salary for the month of August 2018;
- c. Kshs.82,133.77 being one month's salary in lieu of notice;
- d. Kshs.985,605 being 12 months' salary in damages for unlawful termination of employment;
- e. Payment for accrued leave days;
- f. Certificate of service.

The Respondent's Case

6. In its Response dated 11th June 2019, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.
7. The Respondent states that the Claimant was summarily dismissed after having fundamentally breached the regulations concerning his obligations as a Driver. The Respondent adds that the Claimant failed to respond to the notice to show cause, thus justifying the grounds for summary dismissal.
8. The Respondent denies the Claimant's averment that he was not given an opportunity to be heard. The Respondent further denies the Claimant's claim that his employment was unlawfully terminated
9. The Respondent also denies that the Claimant's monthly salary was Kshs.82,133.77.

Findings and Determination

10. There are two (2) issues for determination in this case:
 - a. Whether the Claimant's dismissal was lawful and fair;
 - b. Whether the Claimant is entitled to the remedies sought.

The Dismissal

11. The Claimant was dismissed by letter dated 24th August 2018, stating thus:

“Dear Sir

RE: Summary Dismissal

Our Show-Cause-Notice dated August 23, 2018 and your response thereof refer.

You have deliberately failed to address the issues raised in our

Show-Cause-Notice letter, and therefore your response has no merit.

We confirm that you wilfully deviated from the designated route and made unnecessary stop at an un-authorized place for your own personal gain.

In the event, you committed an offence by exposing company property to risks, and flouting rule (3) of the driver's safety rules and procedures which are well within your knowledge.

Consequently, we have no other option but to summarily dismiss you from employment with immediate effect.

Yours faithfully,



Steel Structures Limited

(signed)

F.K. Njenga

Divisional Director

HR & Admin”

12. Prior to the dismissal, the Claimant had been issued with a show cause notice dated 23rd August 2018, by which he was accused of deviating from the designated route and stopping for 35 minutes at an unauthorised place. The Claimant was required to respond to the show cause notice by noon on 24th August 2018; he responded on 23rd August 2018 giving details of the route he had followed.
13. It would appear that the Respondent was not satisfied with the Claimant’s response, which it termed as evasive. The Respondent therefore went ahead to summarily dismiss the Claimant on 24th August 2018.
14. Section 43 of the *Employment Act* requires an employer who has terminated the employment of an employee to demonstrate a valid reason for doing so. In order to discharge this mandate, the employer must show that the employee was informed of the charges and given an opportunity to defend themselves at the shop floor. This is the essence of Section 41 of the Act, which provides as follows:
 1. Subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
 2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.
15. In this case, all the Respondent did was to issue the Claimant with a show cause notice but the Claimant’s response was summarily rejected and he was dismissed instantly. If the Respondent was dissatisfied with the Claimant’s response to the show cause notice, what it should have done was to subject him to a disciplinary hearing, where evidence of the alleged detour would have been presented.
16. Having failed to do so, the Respondent not only violated the procedural fairness dictates of Section 41 of the *Employment Act* but also failed to establish a valid reason for dismissing the Claimant as required by Section 43 of the Act.

Remedies

17. I therefore award the Claimant eight (8) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service and the Respondent’s failure to afford him an opportunity to be heard as required by law.
18. I further award the Claimant one (1) month’s salary in lieu of notice plus salary for days worked in August 2018.



19. The claim for leave pay was not proved and therefore fails.
20. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 8 months' salary in compensation Kshs.404,280
 - b. 1 month's salary in lieu of notice Kshs.50,535Total Kshs.454,815
21. This amount will attract interest at court rates from the date of judgment until payment in full.
22. The Claimant is also entitled to a certificate of service plus costs of the case.
23. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Kinyanjui for the Claimant

Mr. Nyangoro for the Respondent

